

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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**PETERBOROUGH OIL COMPANY, INC., )  
and DIANE CLARK, )**

**Plaintiffs, )**

**v. )**

**GREAT AMERICAN INSURANCE )  
COMPANY, )**

**Defendant. )**

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**Civil Action No.  
04-40252-FDS**

**MEMORANDUM AND ORDER  
CONCERNING DEFENDANT'S MOTION FOR CLARIFICATION**

**SAYLOR, J.**

Defendant Great American Insurance Company moved on September 23, 2005, for clarification of this Court's Memorandum and Order on Cross-Motions for Summary Judgment, entered on September 14, 2005.

Defendant first seeks clarification as to the Court's ruling on Count 2, which addressed defendant's liability under its duty to indemnify. The Court's order of September 14 provides that Great American is liable to indemnify plaintiff Peterborough Oil for the judgment entered in the Superior Court, which was based on a jury verdict that did not allocate damages, or otherwise distinguish, between the claim that was covered (malicious prosecution) and the claim that was not covered (intentional infliction of emotional distress) under the insurance policy. Defendant correctly notes that the Superior Court judgment is presently on appeal, and therefore the possibility exists that the judgment will be reversed and remanded for new trial, which might lead to a different result (including, among other possibilities, a new, and allocated, jury verdict).

The Court finds that defendant's motion for clarification is appropriate, and will therefore be granted. The judgment in plaintiffs' favor as to Count 2 should be modified to reflect the possibility that the jury verdict may be reversed or modified on appeal.

Defendant further seeks clarification as to Count 1, which addressed defendant's liability under its duty to defend. Defendant states that the judgment should be as to liability only, not damages, the relevant amount of attorneys' fees having not been established. Again, the Court finds the motion to be appropriate, and it will therefore be granted.

For the foregoing reasons, defendant Great American Insurance Company's Motion for Clarification and Partial Amendment of the Court's Order for Judgment in Favor of Plaintiff is GRANTED.

The Court's Memorandum and Order entered on September 14, 2005, is hereby modified in the following respects: judgment will enter in favor of plaintiffs as to liability on Count 1; in favor of plaintiffs as to liability on Count 2, provided, however, that any liability for indemnity shall be limited to any separate award for malicious prosecution or any unallocated award that is based, at least in part, on a claim for malicious prosecution; and in favor of defendant as to Count 3. The foregoing is without prejudice as to defendant's right to seek modification of the judgment pursuant to Fed. R. Civ. P. 60(b) should the interests of justice so require.

**So Ordered.**

Dated: October 28, 2005

/s/ F. Dennis Saylor  
F. Dennis Saylor IV  
United States District Judge